RECORD AND BRIEFS

FILED
APR 20 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-1140

In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, ET AL., PETITIONERS,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA, ET AL., RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* CARE NET IN SUPPORT OF PETITIONERS

John J. Bursch
BURSCH LAW PLLC
Counsel of Record
9339 Cherry Valley Ave SE, #78
Caledonia, MI 49316
(616) 450-4235
jbursch@burschlaw.com

Counsel for *Amicus Curiae*

QUESTION PRESENTED

Whether the Free Speech Clause or the Free Exercise Clause of the First Amendment prohibit California from compelling licensed pro-life centers to post information on how to obtain a state-funded abortion and from compelling unlicensed pro-life centers to disseminate a disclaimer to clients on site and in any print and digital advertising.

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iii

Interest of *Amicus Curiae* 1

Introduction 2

Statement 3

Care Net and its religiously-motivated speech 3

California legislation targeting pro-life beliefs 6

Summary of Argument 9

Argument 10

I. This Court should grant the petition and reverse the Ninth Circuit to protect the speech rights of pro-life, pregnancy resource centers. 10

II. This Court should also grant the petition and reverse the Ninth Circuit to protect the religious rights of pro-life, pregnancy resource centers. 18

Conclusion 20

TABLE OF AUTHORITIES

Cases

Agency for Int'l Dev. v. *Alliance for Open Soc'y Int'l*, 133 S. Ct. 2321 (2013) 2

Central Hudson Gas & Elec. Corp. v. *Public Serv. Comm'n*, 447 U.S. 557 (1980) 13

Employment Division v. *Smith*, 494 U.S. 872 (1990) 18

Greater Baltimore Center for Pregnancy Concerns, Inc. v. *Mayor & City Council of Baltimore*, 721 F.3d 264 (4th Cir. 2013) 17

Lukumi Babalu Aye, Inc. v. *City of Hialeah*, 508 U.S. 520 (1993) 18, 19

New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) 10

Planned Parenthood of Minn., N.D., S.D. v. *Rounds*, 530 F.3d 724 (8th Cir. 2008) 13

Planned Parenthood of Se. Pa. v. *Casey*, 505 U.S. 833 (1992) 13, 15

Riley v. *Nat'l Fed'n of Blind, Inc.*, 487 U.S. 781 (1988) 11, 12

Turner Broad. Sys. v. *FCC*, 512 U.S. 622 (1994) 11

Virginia State Bd. of Pharmacy v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) 13, 14

West Virginia Bd. of Educ. v. *Barnette*,
319 U.S. 624 (1943) 2, 10

Wooley v. *Maynard*,
430 U.S. 705 (1977) 10, 11

Rules

Sup. Ct. R. 37 1

Other Authorities

2 Corinthians 3:18 5

Ephesians 4:15–16 6

Galatians 6:2 3

Guttmacher Institute, *State Facts About Abortion: California* 8

Isaiah 55:11 4

Jeremiah 29:11 5

John 3:16 5

Psalm 39:13 5

Romans 2:4b 4

The Abortion Wars: New class of abortion providers helps expand access in California,
L..A. Times (Oct. 23, 2014) 7

U.S. Const. amend. I 18

INTEREST OF *AMICUS CURIAE*

Care Net is a national non-profit corporation and one of the largest affiliation organizations for pregnancy resource centers in North America. Care Net's mission is to promote a culture of life through the delivery of valuable, life-affirming, evangelistic ministry to people facing unplanned pregnancies and related issues. To accomplish this mission, Care Net provides education, support, and training for its more than 1,100 affiliates. Care Net also runs the nation's only real-time call center, providing pregnancy decision coaching.

Care Net is directly impacted by, and deeply concerned about, California's decision to force pregnancy resource centers in California to become spokespersons for the abortion industry. As detailed below, such compelled speech of a non-commercial, religiously-motivated entity violates the Free Speech and the Free Exercise Clauses of the First Amendment.[1]

---

[1] Consistent with this Court's Rule 37.6, *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than Care Net and its counsel made a monetary contribution to the preparation or submission of this brief. In accordance with this Court's Rule 37.2, all parties were timely notified of Care Net's intent to file this brief, and correspondence consenting to the filing of this brief by all parties has been submitted to the Clerk.

INTRODUCTION

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). Yet such orthodoxy is precisely what the high and petty California politicians proscribe here. The Reproductive FACT Act was enacted with the admitted purpose of targeting pro-life pregnancy resource centers based on the centers' viewpoint that "discourage[s] abortion." Pet. App. 7a. The Act forces the centers to be spokespersons for the abortion industry via compelled speech—specifically, the posting of notices directing women how to obtain a state-funded abortion, and forcing utterance of the obvious fact that the centers do not provide medical treatment. The second requirement is an absurd command to dissuade clients; the first is anathema to organizations whose religiously-motivated speech and conduct is to save lives, not to take them.

In *Agency for International Development* v. *Alliance for Open Society International*, 133 S. Ct. 2321 (2013), this Court said the government could not condition funding on a recipient's promise to express a message; had such a policy been enacted as a direct speech regulation, it would "plainly violate the First Amendment," *id.* at 2327, because "freedom of speech prohibits the government from telling people what they must say," *id.* Yet telling pregnancy resource centers what *they* must say is the FACT Act's entire purpose. This Court should grant the petition and reverse.

STATEMENT

Care Net and its religiously-motivated speech

Care Net is a 501(c)(3) nonprofit that supports one of the largest networks of pregnancy centers in North America and runs the nation's only real-time call center providing pregnancy decision coaching. Care Net and its more than 1,100 affiliates acknowledge that every human life begins at conception and is worthy of protection. For anyone considering abortion, Care Net offers realistic alternatives and Christ-centered support. In 2015 alone, Care Net, its affiliated pregnancy resource centers, and its 30,000 volunteers helped bring more than 73,000 lives into the world.

Over the last seven years, eight of 10 women considering abortion when they entered a Care Net pregnancy center ultimately chose to foster their child's life. Those outcomes are a result of compassion and truthful communication from pregnancy center employees and volunteers. Specifically, Care Net training and best practices emphasize that:

- Everyone should be treated with compassion, unconditional love, and respect. It is important for pregnant mothers to know that someone is there for them, that they are not alone, and that the client advocate to whom they are speaking will walk through the situation with the pregnant mother. As the Bible instructs, "Carry each other's burdens, and in this way you will fulfill the law of Christ." Galatians 6:2 (NIV).

- Conversely, pregnant mothers should never be shamed or made to feel guilty for considering an abortion. An advocate's role is not to bring the conviction of sin—that comes only through the power of the Holy Spirit. Rather, an advocate must show compassion while speaking truth, reminding a pregnant mother that there is always help and hope for her situation.

- Pregnancy center client advocates use persuasion, not manipulation. Effective client advocates avoid potentially manipulative tactics like over-emphasizing abortion-procedure terms, exaggerating abortion risks, or using words like "kill," or "murder," no matter how passionate the client advocate feels about this issue. Client advocates are encouraged to pray before they speak, and to ask God what He wants to communicate to the pregnant mother. God empowers client advocates to present the truth in the most loving and compelling way possible, and it is through God's kindness that people are led to repentance. Romans 2:4b.

- Pregnancy center client advocates strive not to use confrontation negatively. While it is important for pregnant mothers to be fully informed about the impact abortion has on mothers, fathers, and babies, the goal is to speak the truth in love. Negative confrontation represents a failure to love. Client advocates trust that open and honest communication will bring others to the truth. Isaiah 55:11.

- Pregnancy center client advocates validate what pregnant mothers are thinking and feeling. Doing so opens the door to discuss those feelings. Invalidating a pregnant mother's emotions will make her feel isolated, unheard, or uncared for. Even when a client advocate does not agree with a pregnant mother's choice, the advocate can respond compassionately.

- Pregnancy center client advocates do not play the "blame game," and they do not compare pregnant mothers with others who did not get pregnant. Advocates remind mothers that they are fearfully and wonderfully made, Psalm 39:13; that God loves them unconditionally, John 3:16; and that God plans for them to prosper, with plans for a hope and a future, Jeremiah 29:11. Advocates explain that because Jesus felt that every one of us was worth dying for, the pregnant mother's life and that of her unborn child have immeasurable value and dignity.

- Pregnancy center client advocates do not tell pregnant mothers what they should and should not do. They listen well, encourage, give space, and try to present the bigger picture and the truth. True transformation can only come from the mother as God works on her heart. Cf. 2 Corinthians 3:18 ("And we all, who with unveiled faces contemplate the Lord's glory, are being transformed into his image with ever-increasing glory, which comes from the Lord, who is the Spirit.").

- Finally, pregnancy center client advocates offer non-judgmental post-abortion support. By speaking the truth in love, advocates show the love of God and respect pregnant mothers as an autonomous, capable individual. "[S]peaking the truth in love, we will grow to become in every respect the mature body of him who is the head, that is, Christ. From him the whole body, joined and held together by every supporting ligament, grows and builds itself up in love, as each part does its work." Ephesians 4:15–16.

In sum, Care Net's mission is one of love and life. But it can only pursue this mission through compassion and honest communication. When the government forces a pregnancy resource center to become a spokesperson for abortion, that compelled speech distorts the message and sows confusion.

California legislation targeting pro-life beliefs

The State of California has been a leader in pushing a pro-abortion agenda. California law gives teenagers the right to obtain contraception "without an adult's permission or knowledge."[2] In fact, clinics and healthcare providers are prohibited from giving "parents any information about their children's medical treatment, questions or prescriptions of contraception" unless the child consents.[3] California also provides funding for teenagers to obtain contraception without providing identification.[4]

---

[2] NARAL California, Current Laws, https://goo.gl/Eo7PjA.

[3] *Id.*

[4] *Id.*

Unsurprisingly, minors also have the right to obtain an abortion "without notifying their parents or any other adult."[5] If a minor is unable to pay, California will provide the funding and the minor need not involve a parent or guardian.

California has enacted statutes that "protect" pregnant mothers from pro-life counselors who seek to communicate truthful information about the consequences of abortion.[6] Although there are no statewide buffer-zone laws, several major cities have enacted local laws that similarly "protect" pregnant mothers from frank and open speech.[7]

A California state law that went into effect in January 2014 dramatically expanded the supply of abortion providers in California by authorizing nurse practitioners, certified nurse midwives, and physician assistants to perform first-trimester abortions through "vacuum aspiration," [8] a procedure in which a suction catheter is inserted in utero to extract a preborn baby. In the words of the president of the National Abortion Federation, this law cements California's reputation as "the gold standard" for access to abortion.[9]

---

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *The Abortion Wars: New class of abortion providers helps expand access in California*, Los Angeles Times (Oct. 23, 2014), available at https://goo.gl/yD8dZH.

[9] *Id.*

Unlike most other states, "California does not have any of the major types of abortion restrictions—such as waiting periods, mandated parental involvement or limitations on publicly funded abortions."[10] Abortions in California represent 17.0% of all abortions conducted in the United States.[11]

In addition to the compelled-speech law at issue in this case, California's Legislature is considering legislation, AB-569, that would prohibit all employers—including religious employers—from taking an adverse employment action against employees who have an abortion.[12] And, like the compelled speech at issue here, the law requires employers to include a notice in their employee handbook notifying employees of their rights under AB-569.[13]

The subject of the present litigation is California's so-called Reproductive FACT Act. The Act requires non-medical, unlicensed pro-life organizations to provide extensive disclaimers that they are not a licensed medical organization, and it requires licensed medical centers that do not provide abortion to provide notice to all clients about how they can obtain a state-funded abortion. These obligations are not imposed on any other organizations, and are only targeted on those committed to foster life from conception to natural death.

---

[10] Guttmacher Institute, *State Facts About Abortion: California*, https://goo.gl/cn3YHM.

[11] *Id.*

[12] AB-569, https://goo.gl/DNBH57.

[13] *Id.* § (b).

SUMMARY OF ARGUMENT

California's compelled-speech regulations violate the Free Speech Clause in two ways. First, the regulations force pregnancy resource centers to promote an idea—abortion—that they find morally repugnant. Second, the regulations force pregnancy resource centers to engage in unnecessary speech that dilutes the centers' own communications and message. These regulations are subject to strict scrutiny notwithstanding that California says it is only compelling "factual" speech; this Court has long held that compelled speech receives exacting scrutiny whether on matters of fact or opinion. And the level of scrutiny does not change based on the services that the centers provide, since those services do not require patient consent and are not commercial in nature. Moreover, California's regulations fail strict scrutiny because they compel communication of the State's orthodoxy on abortion, are underinclusive, and not narrowly tailored.

California's compelled-speech regulations also violate the Free Exercise Clause. That Clause protects religiously-motivated groups and individuals from being singled out and targeted by the government. And here, it is not difficult to conclude that California targeted religion and religious practices based on the political climate in which the regulations were enacted and the exemptions that the regulations contain.

The government has no power to interfere in a pregnancy resource center's mission by distorting its message. The petition should be granted, the Ninth Circuit reversed, and the Act held unconstitutional.

ARGUMENT

I. This Court should grant the petition and reverse the Ninth Circuit to protect the speech rights of pro-life, pregnancy resource centers.

The petition explains at length why this Court's review is necessary to resolve the conflict between the Ninth Circuit's decision below, this Court's free speech precedents, and the decisions of other circuits involving laws just like California's. Pet. 17–36. Care Net submits this *amicus* brief to highlight how California's compelled-speech regulation interferes with the speech of pregnancy resource centers.

Perhaps the most famous of this Court's decisions involving government-compelled speech is *Wooley* v. *Maynard*, 430 U.S. 705 (1977), the citizen challenge to New Hampshire's statute making it a crime to obscure the words "Live Free or Die" on the State's license plates. As it struck down the New Hampshire statute, this Court recognized that a "system which secures the right to proselytize religious, political and ideological causes must also guarantee the concomitant right to decline to foster such concepts." *Id.* at 714 (citing *W. Va. Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 633–34, 645 (1943) (Murphy, J., concurring)). In other words, the "right to speak *and the right to refrain from speaking* are complementary components of the broader concept of 'individual freedom of mind.'" *Ibid.* (emphasis added). That is because "[g]overnment-enforced [speech] inescapably 'dampens the vigor and limits the variety of public debate.'" *Id.* (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279 (1964)).

Describing New Hampshire's requirement, this Court noted that it had the effect of "requir[ing] [state citizens to] use their private property as a 'mobile billboard' for the State's ideological message or suffer a penalty." *Wooley*, 430 U.S. at 715. Such coercive conduct is unconstitutional: "*The First Amendment protects the right of individuals* to hold a point of view different from the majority and *to refuse to foster*, in the way New Hampshire commands, *an idea they find morally objectionable*." *Id.* (emphasis added).

The *Wooley* Court acknowledged New Hampshire's self-professed interest in requiring the license-plate speech—promoting appreciation of history, individualism, and state pride—but did not find the interest sufficiently compelling to justify the regulation. "[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Id.* at 717.

Thus, since at least the decision in *Woolev*, this Court has consistently recognized that compelled-speech laws are "subject to exacting First Amendment scrutiny." *Riley* v. *Nat'l Fed'n of Blind, Inc.*, 487 U.S. 781, 798 (1988) (government cannot "dictate the content of speech absent compelling necessity, and then, only by means precisely tailored"); *Turner Broad. Sys.* v. *FCC*, 512 U.S. 622, 642 (1994) ("laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as laws regulating speech based on content) (citing *Riley*, 487 U.S. at 798). Accordingly, California's forced-speech regulations are subject to strict scrutiny.

Importantly, the First Amendment does not provide any less protection simply because California's law compels purportedly factual speech. In *Riley*, this Court considered North Carolina regulations that required a professional fundraiser to disclose to a potential donor, before appealing for funds, the percentage of charitable contributions collected over the past year that were given to the charity. North Carolina argued that previous forced-speech precedents were inapplicable because the government was only requiring fundraisers to make true statements of fact. This Court rejected that distinction:

> These cases cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of "fact": *either form of compulsion burdens protected speech*. Thus, we would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate's recent travel budget. Although the foregoing factual information might be relevant to the listener, and, in the latter case, could encourage or discourage the listener from making a political donation, a law compelling its disclosure would clearly and substantially burden the protected speech. [*Riley*, 487 U.S. at 797–98 (emphasis added).]

There also can be no watering down of First Amendment requirements here based on decisions like *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 884 (1992), or *Planned Parenthood of Minnesota, North Dakota, South Dakota* v. *Rounds*, 530 F.3d 724, 733–34 (8th Cir. 2008), cases that involved state regulation of medical professionals and patient informed consent. California's regulations do not target medical procedures that require informed consent of the patient. And this Court's precedents do not support government-required disclaimers or notices before one citizen may speak to another about healthcare issues. Pet. 27–29.

Finally, this case is not about the lesser scrutiny that applies to government regulation of commercial speech. Pregnancy resource centers are not in the business of making money; they are non-profits who do not charge for their services at all. As this Court explained in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), the government's power to regulate commercial speech extends only to "expression solely related to the economic interests of the speaker and its audience." *Id.* at 561. The primary message of pregnancy resource centers is not economic, it is political, social, and religious—to encourage pregnant mothers to preserve the lives of their unborn children. And under this Court's precedent, it is legally irrelevant that a pregnancy resource center is ultimately successful in depriving an abortion clinic of an economic transaction. See *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761–62 (1976) ("[T]he speech whose content deprives it of protection cannot simply be speech *on* a commercial subject. No

one would contend that our pharmacist may be prevented from being heard on the subject of whether, in general, pharmaceutical process should be regulated or their advertisement forbidden.") (emphasis added). That is why a cigarette sale is a commercial transaction but an anti-smoking ad is not. *Id.*

On the merits, the Reproductive FACT Act fails strict scrutiny. Co-sponsored by the abortion advocacy group NARAL, the Act requires pregnancy resource centers to become couriers of California's pro-abortion ideology. Absent the Act, pregnancy resource centers would be free not to direct pregnant mothers to resources for State-funded abortions. Requiring them to do so violates the moral and religious convictions of the centers, their employees, and their volunteers. And it also dilutes the centers' message. When a center lovingly and truthfully speaks to pregnant mothers about God's will to honor the mother's life and dignity as well as that of her unborn child, the government compels the center to post signs providing advice about how to end the unborn child's life. The messages could not be more dissonant and contradictory. When a center's client advocate offers to help carry the burden of a pregnant mother as Christ commands, California requires the center to post a sign that essentially says the mother does not need to continue carrying any burden; the State will pay for an abortion. When a client advocate says that Jesus's death for us shows the immense worth and dignity of the mother and her unborn child, California requires the center to post a sign that communicates the message that there is no value or dignity in a developing fetus.

The legal result would be no different if California was instead trying to influence the other side of this emotional and highly-charged political issue. California could compel an abortion clinic to provide certain medical information so that a pregnant mother can make an informed choice before taking the life of her child. See, *e.g.*, *Casey*, *supra*. But it would violate the First Amendment for California to compel an abortion clinic to post signs informing pregnant mothers that the clinic does not provide live-birth deliveries or support for mothers choosing to continue their pregnancies, directing these women to information that could help them locate a nearby pregnancy resource center where they could reconsider their decision.

California's compelled-speech requirement is also underinclusive and not narrowly tailored to any interest California can articulate. The legislation is underinclusive because it does not regulate discussions of crucial healthcare issues when non-medical speakers discuss non-pregnancy topics, does not regulate pregnancy discussions by non-medical counselors at abortion clinics, and does not regulate pregnancy discussions by many other individuals who may be asked for advice concerning an unexpected pregnancy, such as counselors, teachers, priests, and parents.

Further, California's compelled-speech requirement is not narrowly tailored, because if California is concerned that pregnant mothers are unable to find abortion services, it can engage in public advocacy campaigns, advertise in newspapers and on the Internet, and enlist organizations that support abortion to carry that message to the public. Tellingly, California mandates licensed pregnancy resource

centers to make the abortion-services disclosure to all patients *regardless of the service they receive*, such as the provision of diapers or baby clothes, or even if there are no services being provided at all. Small wonder the Ninth Circuit's decision creates "a circuit split regarding the appropriate level of scrutiny to apply" in "abortion-related disclosure cases." App. 25a.

The Reproductive FACT Act also violates the First Amendment with respect to the extensive disclosure requirements it imposes on non-medical pregnancy resource centers, requiring such centers to include disclaimers in all advertising, in large font and in multiple languages, explaining that the centers do not offer medical services. Again, this is consequently akin to requiring an abortion clinic to include in all *its* advertising that the clinic does not perform live-birth deliveries or provide support for women who choose to bear their children. Though not as explicit as the obligation imposed on pregnancy resource centers that provide medical services, the pro-abortion message is just as ideological and offensive to pregnancy resource centers, their employees, and their volunteers.

These compelled disclaimers make advertising cost prohibitive. Pet. 32–33. Worse yet, they drown out the centers' life-affirming message. Pet. 33. And like the Act's requirement that medical centers direct clients to abortion services, the Act's compelled-disclaimer requirement supports no legitimate state interest. Neither the Ninth Circuit nor California identified any studies showing how women are harmed by unlicensed pregnancy centers, nor how the disclaimer would alleviate those harms. Pet. 34.

In sum, First Amendment supporters, whether pro-life or pro-abortion, should be able to agree that the government can never be in the business of promoting one side of an ideological battle by compelling the speech of those on the other side. In California, the target is pregnancy resource centers. In a different state, the target could be an abortion clinic. Elsewhere, it could be another controversial service entirely. Under the First Amendment, government-compelled speech is unconstitutional in all these circumstances.

California's regulation here is no different than if it forced Alcoholics Anonymous groups to post a sign at their meetings (1) informing participants that alcoholic drinks are not served, and (2) providing a listing of nearby bars and liquor stores. Buying and consuming alcohol is legal; AA encourages individuals not to engage in that legal activity. The government has no power to interfere in AA's mission by distorting its message. The same is true of California and pregnancy resource centers.

Accordingly, this Court should grant the petition, reverse the Ninth Circuit, and invalidate California's compelled-speech regulations because they "fail[ ] to respect [a pregnancy resource center]'s right not to utter a state-sponsored message that offends its core moral and religious principles." *Greater Baltimore Center for Pregnancy Concerns, Inc.* v. *Mayor & City Council of Baltimore*, 721 F.3d 264, 292 (4th Cir. 2013) (Wilkinson, J., dissenting). Even "[t]hose who support most firmly a woman's right to reproductive choice should find it the most disheartening [when a] court's First Amendment jurisprudence is trampling expressive privacy." *Id.* at 294 (Wilkinson, J. dissenting).

II. This Court should also grant the petition and reverse the Ninth Circuit to protect the religious rights of pro-life, pregnancy resource centers.

The First Amendment prohibits Congress from passing laws that interfere with the "free exercise" of religion, a prohibition that applies to the states via the incorporation doctrine. U.S. Const. amend. I; *Employment Division* v. *Smith*, 494 U.S. 872, 893 (1990). The Free Exercise Clause thus " 'protect[s] religious observers against unequal treatment,' and inequality results when a [decision-making body] decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 542–43 (1993) (quotation omitted).

A law's facial neutrality is insufficient to take it outside the scope of the Free Exercise Clause. In *Lukumi*, for example, this Court "reject[ed] the contention . . . that [its free-exercise] inquiry must end with the text of the laws at issue." 508 U.S. at 534 (§ II.A.1, opinion of the Court). "Facial neutrality," said the Court, "is *not* determinative." *Id.* at 534 (emphasis added). Because the record in *Lukumi* "compel[led] the conclusion that suppression" of a religiously-motivated practice "was the object of the" otherwise facially neutral ordinances at issue, this Court held that the ordinances were "designed to persecute or oppress a religion or its practices," *id.* at 547 (§ IV, opinion of the Court); see also *id.* at 559 (Souter, J., concurring in part and in judgment) (joining § IV), were non-neutral, and violated the Free Exercise Clause.

Here, it is not difficult to conclude that California targeted religion and religious practices. The Act's scope is defined to apply only to facilities "whose primary purpose is providing pregnancy-related services." App. 78a. A hospital or clinic that covers non-pregnancy-related services is exempt, for example, even if the hospital or clinic offers the exact same services as the pregnancy resource center.

The Act also exempts from its compelled-speech requirements clinics that are both Medi-Cal providers and Family Planning, Access, Care, and Treatment Program enrollees. App. 79a. That exemption excludes pregnancy resource centers; to participate in the Family Planning, Access, Care, and Treatment Program, a clinic must provide "family planning services," including "all FDA approved contraceptive methods and supplies." Pet. 37. The result is that the Act's compelled-speech burdens fall exclusively on pregnancy resource centers whose religious beliefs preclude them from supplying all FDA approved contraceptive methods and supplies.

The Act represents the precise kind of religious targeting that *Lukumi* prohibits. It requires pregnancy resource centers to advertise a service to which they are religiously opposed and therefore do not offer, just in case someone who comes into the center might want to obtain that service elsewhere. That requirement constitutes religious discrimination and provides a separate and distinct reason for granting the petition, reversing the Ninth Circuit, and invalidating the Act.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

John J. Bursch
Counsel of Record
Bursch Law PLLC
9339 Cherry Valley
Ave SE, #78
Caledonia, Michigan 49316
jbursch@burschlaw.com
(616) 450-4235

APRIL 2017

Attorney for *Amicus Curiae*